HEW KUAN YAU v. MENTERI DALAM NEGERI & ORS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
RAVINTHRAN PARAMAGURU JCA
AHMAD NASFY YASIN JCA
[CIVIL APPEAL NO: W-01(A)-237-05-2021]
6 JULY 2022

Abstract – *The fact that Parliament had granted an 'absolute discretion' under s. 7 of the Printing Presses and Publications Act 1984, to proscribe publications that are deemed undesirable, does not immunise the Minister of Home Affairs' decision from judicial review. The Minister could still be held to have committed an error of law in the exercise of his discretion if the decision in question could be challenged on the grounds of 'illegality, irrationality, procedural impropriety and proportionality'.*

ADMINISTRATIVE LAW: *Judicial review – Appeal against – Minister of Home Affairs ('Minister') banned comic book – Book said to be prejudicial to or likely to be prejudicial to public order and alarm public opinion – Whether decision of Minister subject to judicial review – Extent Minister's decision could be examined on merits – Whether there was proper exercise of ministerial discretion on facts – Whether right of hearing must be accorded before banning book – Whether s. 7 of Printing Presses and Publications Act 1984 constitutional*

This was an appeal from the decision of the High Court that dismissed a judicial review application to lift a ban on a comic book and to strike down the law under which it was made. The appellant was the author of the said comic book, entitled 'Belt and Road Initiative for Win Winism' which elucidated the historical backdrop to the 'Belt and Rod Initiative (BRI)' of the People's Republic of China. The Minister for Home Affairs ('Minister') banned the book six months after its publication *via* a prohibitory order ('PO'). The books were seized and confiscated throughout the country. Apart from the general statutory ground in s. 7 of the Printing Presses and Publications Act 1984 ('PPPA') that the book was prejudicial to or likely to be prejudicial to public order and alarm public opinion, no other reasons were given for the ban. However, in the press release issued by the Ministry of Home Affairs on the same day, the reasons given were that the book: (i) was published with the intention to promote the ideology of communism and socialism; (ii) spread wrong and confusing facts about the communist while trying to raise support and sympathy towards the communist's struggle; and (iii) caused readers, especially the younger generation, to question the history of Malaysia and dispute the struggles of the past leaders/

A icons in fighting for independence and nation building. The appellant commenced judicial review proceedings against the respondent, in the High Court, to challenge the said ban. The High Court Judge ('HCJ'), in dismissing the judicial review application, was of the view that (i) the appellant had not demonstrated that the Minister's action came within the ambit of the
B 'illegality, irrationality, procedural impropriety and proportionality' principle that was propounded in the case of *Council of Civil Service Unions & Ors v. Minister For Civil Service* ('*CCSU* case'); (ii) there was evidentiary basis for the Minister to conclude that the book was likely to be prejudicial to public order. The Minister had not acted irrationally or unreasonably; (iii)
C under s. 7 of the PPPA, the Minister had 'absolute discretion' to issue the PO and as such, could not be said to have committed an error of law. The judicial review concerned the decision making process and not the merits of the decision; (iv) the PPPA does not provide the right to be heard and therefore, it could not be said that there was a breach of natural justice; and
D (v) section 7 of the PPPA was declined to struck down as unconstitutional as the right to freedom of speech and expression in art. 10(1) of the Federal Constitution is not absolute as restrictions are permitted under art. 10(2). Hence, this appeal. The issues that arose were: (i) whether the decision of the Minister under s. 7 of the PPPA was subject to judicial review; (ii) if so, to what extent could it be examined on the merits; (iii) whether the High Court
E was correct in holding that there was proper exercise of ministerial discretion on the facts; (iv) whether a right of hearing must be accorded before banning the book; and (v) whether s. 7 of the PPPA should be struck down as unconstitutional.

F **Held (allowing appeal; setting aside decision of High Court)**
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The proposition by the HCJ, that the Minister 'cannot be guilty of an error in law' in the exercise of his discretion because the discretion is stated to be 'absolute', was not tenable. Notwithstanding the fact that
G discretion in s. 7 of the PPPA is stated to be 'absolute' and the fact that 'public order' is cited as a ground for the decision, the exercise of the discretion of the Minister was reviewable if it came within the accepted grounds of challenge which was enunciated in the *CCSU* case. (para 14)

(2) In matters concerning public order or national security, greater
H deference should be paid to the opinion of the Minister. However, it did not necessarily follow that the court should abdicate its proper role in a judicial review application by not examining the facts. The court was still duty bound to consider whether the act in question could be challenged for breaching administrative law principles. The HCJ was
I not precluded from examining the evidence in this case to determine whether the decision to ban the book, though legal in the sense that the

Minister was empowered to do so under s. 7(1) of the PPPA, it was nonetheless an unreasonable exercise of power or was irrational and in defiance of logic, in that, a similarly circumstanced Minister would not have arrived at the same decision. The HCJ had not properly examined the evidentiary basis for the PO. Her Ladyship appeared to have accepted without objective analysis, the reasons given in the affidavit of the Minister. (paras 17, 22 & 23)

(3) The Minister failed to point any content in the book that could be said to be the equivalent of a 'spark in a powder keg' which would endanger the public interest by inciting racial unrest, disharmony or riots. The fact that the book was in circulation for some six months before it was banned with no untoward incident occurring, spoke volumes in respect of the unfounded fear that the book was likely to cause racial disharmony or riots. However, this fact was not given sufficient consideration by the HCJ. The question *ie,* whether the High Court was correct in holding that there was proper exercise of ministerial discretion on the facts was, answered in the negative as there was no evidence whatsoever to suggest prejudice to public order or likelihood thereof that permitted the invocation of the drastic power given in s. 7(1) of the PPPA. (paras 30, 31 & 35)

(4) There could be instances where speed may be of the essence and it would not do to give a right of hearing (*Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal*). Only on hindsight, it would appear otherwise. For that reason, although it appeared that no harm would have been done in giving the appellant a right of hearing, the court was not prepared to quash the decision on this ground alone. (para 40)

(5) The right to freedom of expression is not absolute and Parliament had placed restrictions on it through s. 7 of the PPPA. In respect of the 'absolute discretion' granted to the Minister under s. 7 of the PPPA, having regard to the authorities, it was clear that whatever label was attached to the nature of the discretion, the Minister's action could be questioned if it breached administrative law principles. In the premises, there was no reason why the entire section should be struck down as being unconstitutional. Hence, the declaration to strike down s. 7 of the PPPA should not be granted. (para 41)

Case(s) referred to:

Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 1 LNS 296 CA ***(dist)***

Council Of Civil Service Unions & Ors v. Minister For The Civil Service [1985] 1 AC 374 ***(refd)***

Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia) [2012] 9 CLJ 297 CA ***(refd)***

A *Islamic Renaissance Front Bhd v. The Minister Of Home Affairs [2020] 5 MLJ 399 HC* ***(refd)***
Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri [2018] 9 CLJ 496 CA ***(refd)***
Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd
B *[1978] 1 LNS 143 FC* ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
S Rangarajan v. P Jhagivan Ram & Ors [1989] 2 SCC 574 ***(refd)***
Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal [2015] 2 CLJ 328 CA ***(foll)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
C

Legislation referred to:
Federal Constitution, art. 10(1), (2)
Printing Presses and Publications Act 1984, s. 7(1)

For the appellants - Shamesh Jeevaretnam & Vince Tan Hoo Seh; M/s Jeeva Partnership
For the respondent - Ahmad Hanir Hambly & Ng Wee Li; AG's Chambers
D

[Editor's note: For the High Court judgment, please see Hew Kuan Yau v. Menteri Dalam Negeri & Ors [2021] 8 CLJ 911 (overruled).]

Reported by Lina E

E

JUDGMENT

Ravinthran Paramaguru JCA:

[1] This is an appeal from the decision of the High Court that dismissed a judicial review application to lift a ban on a comic book and to strike down the law under which it was made.

F

Background Facts

[2] The appellant is the author of a comic book that purportedly elucidated the historical backdrop to the "Belt and Road Initiative" (BRI) of the Peoples Republic of China and heaped lavish praise on it. The BRI is an
G official policy of China to invest in many countries. The title of the book is "Belt and Road Initiative for Win Winism". It was published on 18 April 2019. The Minister for Home Affairs (the Minister) banned the book six months later on 23 October 2019 *via* a Prohibitory Order (the PO) published in the Federal *Gazette* (P.U. (A) 288/2019). The law that was invoked was
H s. 7 of the Printing Presses and Publications Act 1984 (the PPPA). All three versions of the book in Malay, English and Chinese were banned. Thereafter, the books were seized and confiscated throughout the country. Apart from the general statutory ground in s. 7(1) of the PPPA that the books are prejudicial to or likely to be prejudicial to public order and alarm public
I opinion, no other reasons were given for the ban of the comic book in the PO. However, in the press release issued by the Ministry of Home Affairs on the same day, the following reasons were given:

(i) that the comic book was published with the intention to promote the ideology of communism and socialism;

(ii) that the comic book spreads wrong and confusing facts about communist while trying to raise support and sympathy towards the communist struggle; and

(iii) that the comic book causes readers especially the younger generation to question the history of Malaysia and disputes the struggles of the past leaders/icons in fighting for independence and nation building.

[3] Before the High Court, the applicant raised the following grounds to challenge the ban:

(i) The Minister's decision is unreasonable and irrational as the book does not promote communism or socialism. The book focuses on the BRI and the background of the relationship between Malaysia and China. Thus, the book cannot come within the ambit of s. 7(1) of the PPPA.

(ii) That there is insufficient evidence to support the conclusion the comic book is prejudicial to or is likely to be prejudicial to public order, security or alarm public opinion. The Minister's decision is biased and was made in bad faith.

(iii) The decision was political in nature and was a bid to discredit him and his former political party.

(iv) The decision was disproportionate. The appellant suffered damage to his reputation and had to resign from his position as the Chief Executive Officer of the Malaysia-China Business Council.

(v) The appellant was not given a right to be heard before the PO was issued. Police investigation was still ongoing on the day of the ban. The Home Minister did not give any consideration to the appellant's two letters appealing against the said PO.

(vi) Section 7(1) of the PPPA is unconstitutional as it gives absolute discretion to the Minister.

(vii) The ban fails the reasonableness test that is propounded in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 and *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ 507.

[4] On the other hand, the case of the respondents was that the ban was made after sufficient available material was scrutinised by the Minister and he formed the opinion that the book is likely or has the potential to prejudice public order.

A **Decision Of The High Court**

[5] The learned High Court Judge considered the affidavit in reply of the Minister. In it, the Minister referred to various statements and depiction of historical events in the comic book. He said it could cause racial disharmony and tension or confusion among the various races in the country. The
B Minister said that the appellant was promoting socialism as practised in China. The Minister also referred to the 81 police reports lodged against the comic book and the adverse responses in social media to justify his decision to ban the book on the ground that it is likely to prejudice public order.

C **[6]** In respect of the claim of the appellant that the book was given by the Right Honourable Prime Minister of Malaysia to the President of China, the Minister averred that it was not an official gift and that it was brought to China during his official visit through improper channels. However, it was not disputed that the Right Honourable Prime Minister did give the book to the President of China.

D

[7] The learned High Court Judge was of the view that the appellant had not demonstrated that the Minister's action came within the ambit of the "illegality, irrationality, procedural impropriety and proportionality" principle that was propounded in the celebrated House of Lords case of
E *Council Of Civil Service Unions & Ors v. Minister For The Civil Service* [1985] 1 AC 374 (the *CCSU* case). Her Ladyship said that, viewing the facts objectively, there was evidentiary basis for the Minister to conclude that the book was likely to be prejudicial to public order. Therefore, Her Ladyship found that the Minister had not acted irrationally or unreasonably. However, in another part of the judgment, Her Ladyship said that under s. 7 of the
F PPPA, the Minister has "absolute discretion" to issue a PO and as such, cannot be said to have committed an error of law. Her Ladyship also said that judicial review is concerned with the decision-making process and not the merits of the decision. In respect of the right to be heard, the learned High Court Judge found that PPPA had not provided for it and therefore it cannot
G be said that there was a breach of natural justice. Her Ladyship also declined to strike down s. 7 of the PPPA as unconstitutional as she held that the right to freedom of speech and expression in art. 10(1) of the Federal Constitution is not absolute as restrictions are permitted under art. 10(2). In the premises, Her Ladyship dismissed the judicial review application.

H **Grounds Of Appeal**

[8] The grounds of appeal are as follows:

(i) That judicial review is only concerned with the decision-making process but not the merits of the decision.

I (ii) That in a judicial review application the court should not substitute the decision of the Minister with its own decision.

(iii) That the Minister has absolute discretion in the issuance of the PO under s. 7 of the PPPA.

(iv) That the Minister is the best person to make decisions pertaining to public order and the courts should not interfere with its decision.

(v) That in balancing the requirement of public order and the interest of the appellant, more weight should be given to the view of the Minister.

(vi) That the learned High Court Judge misdirected herself in holding that the Minister had evidentiary basis for the ban.

(vii) That the principles of judicial review in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 were not applied by the learned High Court Judge.

(viii) The learned High Court Judge failed to consider that no incident prejudicial to public order or security or that which alarmed public opinion had occurred since the publication of the book.

(ix) The learned High Court Judge erred in holding that s. 7(1) of the PPPA is valid and constitutional.

(x) That the High Court failed to consider that the PO was not published with the real name of the Minister in the *Gazette.*

Issues

[9] We find that some of the grounds of appeal are overlap. As for the ground in respect of the real name of the Minister, we shall not deal with it as it was not pursued during oral arguments. As we said earlier, the learned High Court Judge gave significant emphasis to the "absolute discretion" of the Minister in s. 7 and also the traditional approach in judicial review which is that the court is only concerned with the decision-making process and not the decision itself. But to be fair to Her Ladyship, she also said that she tested the exercise of the Minister objectively to determine whether there was evidentiary basis for the book ban. In the premises, the main issues that arise in this appeal are:

(i) Whether the decision of the Minister under s. 7 of the PPPA is subject to judicial review?

(ii) If so, to what extent can it be examined on the merits?

(iii) Whether the High Court is correct in holding that there was proper exercise of ministerial discretion on the facts?

(iv) Whether a right of hearing must be accorded before banning the book?

(v) Whether s. 7 of the PPPA should be struck down as unconstitutional?

A *Whether Decision Is Reviewable?*

[10] Section 7(1) reads as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[11] We note that the "discretion" given to the Minister in s. 7 is referred to as "absolute discretion". The learned High Court Judge gave significance to the word "absolute" in the following passage of the judgment:

> [19] It cannot be disputed that the Minister by virtue of sub-s. 7(1) of the Act after being satisfied that the contents of the book is in any manner prejudicial to or likely to be prejudicial to public order or which is likely to alarm public opinion, or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, is given an absolute discretion to issue the PO dated and published in the *Gazette* of 23 October 2019 prohibiting the publication of the book. **As such the Minister cannot be said to have been guilty of an error of law in his action as he had exercised the power which in law he possesses.** (emphasis added)

[12] In our respectful opinion, the fact that Parliament had given "absolute discretion" under s. 7 to proscribe publications that are deemed undesirable does not necessarily immunise the Minister's decision from judicial review. The Minister can still be held to have committed an error of law in the exercise of the discretion if the decision in question can be challenged on the ground of "illegality, irrationality, procedural impropriety and proportionality". To hold otherwise would mean that the jurisdiction of the court is effectively ousted even though there is no ouster clause in the PPPA. This issue was addressed in the Court of Appeal case of *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal* [2015] 2 CLJ 328. It was also a book banning case under s. 7(1) of the PPPA. Mohamad Ariff Yusof JCA said as follows in respect of the words "absolute discretion" and the absence of an ouster clause in PPPA:

> Despite the seeming breadth of the Minister's power and discretion, the PPPA does not purport to provide an exclusion clause for a s. 7 exercise of discretion. In other words, there is no statutory provision to disallow challenge in a court of law on the ground that the Minister's decision shall be final and should not be questioned in any court of law on any ground whatsoever.

[13] In the latter case of *Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri* [2018] 9 CLJ 496, some books were banned by the Minister after he relied on a decision of the Jawatankuasa Fatwa. The Court of Appeal speaking through Zaleha Yusof JCA (later FCJ), cited the well-known case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 and said that although the discretion of the Minister in s. 7(1) is stated to be absolute, "such discretion must also have legal limits to avoid it being abused".

[14] In the premises, with respect, we are of the opinion that the proposition by the learned High Court Judge that the Minister "cannot be guilty of an error in law" in the exercise of his discretion because the discretion is stated to be "absolute" is not tenable. We are of the view that notwithstanding the fact that discretion in s. 7 of the PPPA is stated to be "absolute" and the fact that "public order" is cited as a ground for the decision, the exercise of the discretion of the Minister is reviewable if it comes within the accepted grounds of challenge which were enunciated in the celebrated *CCSU* case (*supra*) which has been consistently followed by our courts.

Whether Decision Can Be Examined On The Merits?

[15] Learned counsel for appellant has taken exception to the following passage in the judgment of the High Court:

> [36] After going through the book, even if the court is of the different view with the Minister's evaluation and decision, the court is reminded time and time again that it should not substitute what it thinks is the correct decision. What the court is concerned with is not the decision but the decision-making process. It does not entail the court substituting its discretion for that of the decisionmaker. The Government has a right to preserve public peace and order.

[16] The complaint of the appellant is that the High Court has taken the traditional approach by saying that the court is only concerned with the decision-making process and not the decision itself. Therefore, the court cannot substitute the opinion of the Minister with its own.

[17] With respect, we cannot wholly agree with the statement of the learned High Court Judge that in a judicial review application the court cannot substitute the opinion of the Minister with its own for the following reason. It is too strict a proposition. It would seriously curtail judicial scrutiny of administrative decisions. We would readily agree that in matters concerning public order or national security, greater deference should be paid to the opinion of the Minister. But it does not necessarily follow that the court should abdicate its proper role in a judicial review application by not examining the facts. The court is still duty bound to consider whether the act in question can be challenged for breaching administrative law

principles. This was the position taken in a number of recent books banning cases in which the PO issued by the Minister was quashed. We shall cite two of them here to drive home the point that regardless of the reliance on public order in s. 7(1) of the PPPA, the decision of the Minister is not shielded from curial scrutiny.

[18] In *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297; 2012] 6 MLJ 340, the book in question was in circulation for two years before it was banned on the ground of being prejudicial to public order. The Court of Appeal speaking through Abdul Wahab Patail JCA acknowledged that the court "will not readily question administrative decisions". The court was also mindful of the classic administrative law maxim that judicial review is only concerned with the decision-making process and not the decision itself. Nonetheless, the court held that the examination of the decision-making process is not confined to checking if the various overt steps in the process had been adhered to but that it is the duty of the court to intervene if the decision was *ultra vires* or unfairly or unjustly exercised.

[19] And in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal* (*supra*), Mohamad Ariff Yusof JCA had this to say in respect of the argument that the court cannot substitute the decision of the Minister with its own:

> [47] The argument by the respondents that the court should not step into the shoes of the Minister has to be qualified, since, if fully accepted, it will truncate the role of the court in controlling excesses of administration and run foul of accepted principles of administrative law, as presently developed. Here we are faced with an exercise of ministerial discretion under s. 7 of the PPPA, which affects a citizen's freedom of expression under the Federal Constitution, in which challenge has been mounted not only on the ground of procedural fairness and breach of natural justice – the so-called ground of "procedural impropriety". The challenge has been based as well on the grounds of "illegality" and "irrationality". Where an exercise of discretion has a constitutional dimension, it is incumbent on the court to examine that exercise more vigilantly, and not rely solely on the *ipse dixit* of the Minister.

[20] The traditional approach was also not strictly followed in the book banning case that we cited earlier, namely *Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri & Ors* [2018] 9 CLJ 496. In that case, Zaleha Yusof JCA pointed out that the recent trend in judicial review is that the test used has advanced from the subjective to the objective test and that the court will also look into substantive fairness where fundamental liberties are concerned. The relevant passage is as follows:

> [19] We must also bear in mind, that it is the appellant's contention that his fundamental rights under the Federal Constitution have been infringed. The recent trend in judicial review as decided by our apex court is that the test used had advanced from the subjective to that of the objective test, if state action affects fundamental right, the court will not only look into procedural fairness but also substantive fairness. See: *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765. Hence in this instance, this court is entitled to look not only at the procedural aspects but also at the substance or merits of decision made by the Minister. It is therefore not wrong for this court to enquire as to the reasonableness or fairness of the Minister's decision.

[21] However, as acknowledged in the above cases and other cases that we have not cited, the courts would not readily interfere with the discretion or the opinion of the executive unless it contravenes administrative law principles. If fact, no court has said that the examination of the state action for substance is akin to exercising appellate powers. But as Edgar Joseph Jr FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* (*supra*) observed, when a decision is challenged on grounds of "illegality" and "irrationality", in practice, it would permit the courts to scrutinise such decisions not only for process, but also for substance. We would add that otherwise, it would not be possible to subject the state action to the "illegality" or "irrational" test in any meaningful way. It follows that the facts underpinning the impugned executive decision must necessarily be subjected to some measure of objective evaluation. However, as we said earlier, that exercise should not be approximate to the level of scrutiny found in the appellate process and due deference should be paid to the opinion of the Minister who may be better placed in cases involving public order or national security than the court.

[22] In the premises, in the instant case, the learned High Court Judge was not precluded from examining the evidence in this case to determine whether the decision to ban the comic book, though legal in the sense that the Minister was empowered to do so under s. 7(1) of the PPPA, it was nonetheless an unreasonable exercise of power or was irrational and in defiance of logic in that a similarly circumstanced Minister would not have arrived at the same decision.

Whether Discretion Correctly Exercised?

[23] In our respectful view, the learned High Court Judge had not properly examined the evidentiary basis for the PO. Her Ladyship appeared to have accepted without objective analysis the reasons given in the affidavit of the Minister. The reasons are that the book promoted communism and socialism as practiced in China, contained historical inaccuracies, and contained allegations which had no basis in fact. Thus, the comic book had the potential

to cause ill will and disrupt racial harmony between the different races in Malaysia. To our mind, the crucial question is not whether the book had promoted the BRI or expressed support for socialism as practised in China or whether it contained historical inaccuracies. The question is whether the book was likely to prejudice or had the potential or had prejudiced public order and alarmed public opinion.

[24] In the affidavit of the Minister, there were numerous allegations about the content of the comic book which covered a very wide range of historical events from the time of the Malacca Sultanate to the time of the launch of the BRI. In respect of the allegation that the comic book praised China excessively, the Minister stated as follows in para. 9 of the affidavit in opposition:

> 9.8 Pengedaran buku ini ke sekolah adalah amat tidak sesuai memandangkan kandungannya terlalu mengagungkan Negara China. Secara tidak langsung, kandungan buku ini akan menjejaskan semangat cintakan Negara di kalangan pelajar sekolah;

[25] The appellant's reply was that the books were not distributed to school children. But the appellant admitted that copies were donated to the school libraries and that the school management could remove the books as they see fit and that it is not a good reason to ban the book.

[26] In respect of the allegation that the comic book promoted communism and supported its cause, we note that the Minister did not refer in his affidavit to any particular content of the comic book to show that to be the case. Instead, there is a general statement that the appellant promoted communist ideology in the comic book. It is as follows:

> 9.9 Kandungan buku tersebut secara amnya cuba mempromosikan ideologi komunisme dan sosialisme, menyebarkan fakta yang salah dan mengelirukan tentang komunis serta mengandungi unsur membangkitkan sokongan dan simpati terhadap perjuangan komunis;

[27] In para. 9.10, the Minister averred that comic book raises doubt among the youth about the achievement of the country's leaders in the fight for independence. In para. 9.11, the Minister averred that the book did not consider the sensitivities of the multi-racial and multi-religious population of the country and that the comic book would cause racial disharmony. We shall now refer to the affidavit of the Minister in which he specifically identified the various pages of the comic book that purportedly supports the above allegations. The said paragraphs of the affidavit were reproduced in para. 23 of the judgment of the High Court. It is as follows:

> **Muka surat 14**
>
> (i) Pemohon menyatakan disebabkan etnik dan isu agama, kebanyakan pemuda Melayu lebih prihatin kepada isu-isu semasa negara-negara Islam seperti Indonesia atau zon rantau timur-tengah. Walaubagaimanapun,

terdapat segelintir daripada kamu Melayu turut mengikut ideologi-ideologi dari Eropah dan Amerika Syarikat atau dikenali sebagai pro-Barat tetapi merupakan golongan minoriti;

(ii) Pernyataan sebegini boleh menjurus kepada pertelingkahan antara kaum dengan melabelkan majoriti bangsa Melayu hanya prihatin kepada sesetengah isu dan hanya minoriti mengikuti ideologi Barat;

Muka surat 15

(iii) Pemohon menyatakan berdasarkan kajian yang dijalankan oleh Merdeka Centre for Opinion Research pada tahun 2018, didapati terdapat sebanyak 18.1% daripada rakyat Malaysia merupakan penyokong atau simpati kepada Jemaah Islamiah yang dikenali sebagai kumpulan ekstremis yang aktif di Asia Tenggara. Sebahagian daripada masyarakat Muslim di Filipina (15.7%), Indonesia (12.6%) dan Thailand (9.6%) turut menyokong kumpulan tersebut;

(iv) Pemohon juga menyatakan penduduk Melayu radikal yang prihatin tentang pelaksanaan dasar etnik di Xinjiang menyebabkan mereka mempunyai tanggapan yang negative terhadap China. Terutamanya dalam hal mengenai kerajaan China mengharamkan sekelompok minoriti Uighur yang terlibat dalam Gerakan pemisah yang telah mengancam perpaduan dan harmoni masyarakat;

(v) Gambar dengan pernyataan kesiannya Umat Islam ditindas oleh Kerajaan Komunis;

(vi) Pernyataan-pernyataan ini cuba menyebabkan sikap Islamophobia di kalangan pembaca. Ini juga cuba menggambarkan rakyat Malaysia beragama Islam menyokong kepada Jemaah Islamiyah. Pemohon juga cuba mempertahankan keputusan Kerajaan China dalam mengharamkan minoriti Uighur dan melabelkan penduduk Melayu yang menentang penindasan Uighur sebagai radikal;

(vii) Karikatur seorang pemuda berkopiah, berserta karikatur Osama bin Laden dan seorang pejuang IS dengan pernyataan-pernyataan di muka surat 3 ini memberikan gambaran seolah-olah rakyat Islam di Malaysia ada yang menyokong perjuangan pengganas tersebut;

(viii) Pernyataan-pernyataan dan karikatur di muka surat 3 ini boleh menyebabkan ketegangan kaum yang serius;

Muka surat 16

(ix) Gambar-gambar dan pernyataan menunjukkan golongan generasi tua kaum Melayu mempunyai sentiment anti-komunis disebabkan propaganda parti politik UMNO selama 5 dekad;

(x) Sentimen anti-komunis menyebabkan masyarakat mempunyai prasangka dan salah faham terhadap Inisiatif Jalur dan Jalan (BRI);

(xi) Pernyataan-pernyataan ini cuba menunjukkan bahawa sentiment anti-komunis merupakan perkara yang tidak betul;

Muka surat 17

(xii) Kaum India pula dinyatakan dipengaruhi negara asal mereka iaitu India mengenai pemahaman mereka terhadap kebangkitan Cina;

(xiii) Hubungan Kerajaan India dan Kerajaan China agak rumit dan konflik tersebut mempengaruhi persepsi Kaum India terhadap BRI;

(xiv) Malaysia digambarkan seolah-olah tersepit antara konflik China dan India;

(xv) Gambar menunjukkan pemimpin China seorang yang mesra tapi pemimpin India pula dalam keadaan tidak selesa;

(xvi) Pernyataan-pernyataan ini menunjukkan seolah-olah ketiga-tiga buah Negara mempunyai hubungan yang tidak harmoni dan kaum India di Malaysia mempunyai persepsi yang negatif terhadap Negara China;

Muka surat 18

(xvii) Digambarkan seolah-olah rakyat China, India dan Melayu mempunyai pandangan berbeza mengenai BRI;

Muka surat 20 hingga 30

(xviii) Mengagungkan Negara China dan ideologi sosialisme;

(xix) Rakyat Malaysia lebih biasa dengan American dream (m/s 18);

(xx) Kebanyakan orang ketagih kepada budaya barat dan menjadi sebahagian daripada kehidupan dan malah menganggap nilai-nilai tersebut sebagai nilai tamadun sejagat;

(xxi) Xenophobia merupakan fenomena yang biasa dalam Malaysia. Kebanyakan kaum Cina di Malaysia yang hanya bertutur Bahasa Inggeris dan tidak fasih bahasa ibunda mereka akan menjadi golongan elit. Orang Cina yang hanya bertutur Bahasa Cina akan dipandang rendah dan digelar Cina Apek (p. 29);

Muka surat 110

(xxii) Pernyataan-pernyataan yang cuba menyebarkan ideologi sosialisme yang ternyata boleh menimbulkan ketegangan kaum dan tidak menghormati antara perkara asas dalam Perlembagaan Persekutuan mengenai kontrak sosial;

Muka surat 134

(xxiii) Pernyataan "500 tahun lalu, Dinasti Ming bukan sahaja membawa kemakmuran kepada Melaka malah melindungi Melaka daripada ancaman Siam dan lanun."

(xxiv) Saya tidak menafikan manfaat hubungan di antara Kerajaan Melayu Melaka dengan Kerajaan China namun demikian kenyataan tersebut seolah-olah tidak mengambil kira fakta pencapaian Kerajaan Melayu Melaka sebelum menjalinkan hubungan dengan China;

Muka surat 135

(xxv) Pemohon menyatakan Tentera Jepun memerintah Malaya dengan rejim fasisme radikal, terutama terhadap komuniti Cina tempatan, yang menjadi mangsa kekejaman Jepun. Manakala terhadap orang Melayu, Jepun dikatakan mengambil pendekatan memujuk dengan slogan Asia untuk Orang Asia;

(xxvi) Pernyataan dan karikatur di muka surat ini menggambarkan seolah-olah masyarakat Melayu adalah lemah kerana hanya menjadi sasaran pujuk rayu askar Jepun sedangkan sejarah membuktikan bahawa orang Melayu telah bangkit menentang penjajahan Jepun;

Muka surat 136 hingga 137

(xxvii) Pernyataan-pernyataan di muka surat ini menggambarkan seolah-olah pergerakan anti-Jepun hanya terdiri daripada penduduk Cina tempatan;

(xxviii) Memaparkan karikatur orang Cina menentang penjajahan British setelah pemerintahan Jepun dan pengisytiharan darurat oleh British dengan menempatkan semua orang Cina ke kampong baru yang dipagar dengan wayar besi;

(xxix) Penempatan semula di bawah Rancangan Briggs adalah bertujuan untuk menyekat sokongan kepada gerila komunis yang masih melakukan penentangan bersenjata selepas Jepun menyerah kalah. Semasa penjajahan Jepun, kebanyakan orang cina tinggal di merata tempat. Namun penempatan semula tersebut telah mewujudkan lebih kurang 550 buah kampong baru;

(xxx) Gambar dan karikatur kampong baru tersebut dikelilingi wayar besi seolah-olah menunjukkan penindasan terhadap kaum Cina merupakan suatu penyelewengan fakta sejarah;

Muka surat 138

(xxxi) Karikatur Tunku Abdul Rahman yang berpeluh dengan menyatakan kita anti-komunis cuba menggambarkan seolah-olah Tunku seorang yang lemah dan dipaksa menyatakan pendirian tersebut atas tekanan pihak British;

(xxxii) Pernyataan bahawa British terpaksa menyerahkan kuasa pentadbiran kepada parti politik sayap kanan atau golongan elit seolah-olah cuba menggambarkan bahawa pemimpin tempatan pada masa tersebut didominasi oleh golongan atasan. Namun hakikatnya ramai pejuang kemerdekaan daripada pelbagai lapisan masyarakat telah berganding bahu memperjuangkan kemerdekaan Negara pada masa tersebut;

Muka surat 139

(xxxiii) Terdapat segelintir kaum Cina yang tidak menyokong pembentukan pakatan Kerajaan, sama ada menjadi ahli Parti Komunis Cina, atau ahli Parti Buruh Malaya. Kebanyakan mereka turut menjadi

A mangsa semasa kawalan rusuhan. Mereka telah dimasuk ke dalam penjara dan terpaksa dipisahkan daripada keluarga. Orang Cina yang menentang pakatan tersebut telah menderita pada tahun 60an dan 70an.

(xxxiv) Pernyataan ini adalah satu penyelewengan fakta sejarah yang boleh mencetuskan sentiment pertelingkahan antara kaum. Hakikatnya
B pada masa tersebut pihak berkuasa hanya memburu komunis yang masih melakukan pemberontakan bersenjata walaupun Negara telah mencapai kemerdekaan;

Muka surat 142

(xxxv) "DAP disokong oleh agama Kristian! Jadi mengundi kerajaan baru
C akan mengakibatkan orang Kristian menjajah Muslim." Dengan karikatur seorang penceramah beragama Islam;

(xxxvi) Sekiranya benar pengataan dikatakan oleh seorang pemimpin, perkara sebegini tidak wajar disebarkan lagi kerana boleh mengundang kepada perpecahan di kalangan masyarakat. Tambahan lagi, buku ini telah
D diedarkan di sekolah;

Muka surat 147

(xxxvii) Pernyataan "Rakyat Malaysia akhirnya menolak 61 tahun rejim otoritarian dan harapan yang baru kepada demokrasi" menggambarkan seolah-olah Malaysia sejak kemerdekaan ditadbir tanpa proses demokrasi
E dan menidakkan proses pilihanraya di Negara ini; dan

(xxxviii) Pernyataan sebegini amat tidak sesuai terutamanya kepada golongan muda kerana ianya menidakkan jasa pemimpin-pemimpin terdahulu sejak kemerdekaan.

[28] We have perused the above-mentioned averments and the content of
F the comic book. The Minister may have good reason to disagree with the appellant's interpretation of history, his worldview or his comments on current affairs particularly in respect of China's BRI policy and its treatment of the Muslim minority in Xinjiang. The Minister may also have reason to disagree with the suggestion that a survey showed that a certain percentage
G of Malaysians sympathised with the cause of the Islamic State. It may well be that professional historians, the majority of the public or even us, may disagree with the appellant's take on history and current events. But surely disagreement with someone's view, even if justified on the basis that the author did not get the facts right or misinterpreted them, cannot be a reason
H to ban a book. Otherwise, the constitutional right to freedom of expression would be rendered illusory. It would even imperil academic research. In this context, we note that the Minister had disagreed with the view expressed in the comic book that diplomatic relations between the Ming Dynasty of China and the Malacca Sultanate enabled the latter to prosper. We would reiterate
I that, viewed objectively, there is nothing incendiary in the book that that pits one race against another or insults anyone's racial or religious sentiment or stokes racial tension as alleged in the affidavit of the Minister.

[29] In the Indian Supreme Court case of *S Rangarajan v. P Jhagivan Ram & Ors* [1989] 2 SCC 574 (which was cited by the High Court in this case and the Court of Appeal in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal* (*supra*), it was said that the freedom of expression cannot be suppressed unless community interest is endangered. The relevant passage reads as follows:

> Court's commitment to freedom of expression demands that it cannot be suppressed unless the situation created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

[30] We would agree with the counsel for appellant that the Minister in his affidavit failed to point to any content in the comic book that can be said to be the equivalent of a "spark in a powder keg" which would endanger the public interest by inciting racial unrest, disharmony or riots. We also find it necessary to say in this context that the Court of Appeal case of *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296 which was cited by the learned Senior Federal Counsel can be distinguished. In that case, the attempt to lift the ban failed. The proscribed book which was written in Tamil was about a racial riot. The facts of this case were summed up in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal* (*supra*) by Mohamad Ariff Yusof JCA. We can do no better than reproduce the relevant passage below as the distinction made in that case applies in the instant case as well:

> [51] *Arumugam Kalimuthu*, *supra*, was a case where a book written in Tamil touched on the racial disturbance in Kampung Medan, Selangor. It contained passages which seemed to apportion blame between the Malays and Indians. No doubt the contents borrowed from an academic thesis, but there were passages in the book which tended to inflame racial sensitivities. That was the reason why the High Court upheld the decision of the Minister to ban the book. The Court of Appeal affirmed the decision. The context, however, is different; the subject matter likewise is different.

[31] The fact that the comic book in the instant case was in circulation for some six months before it was banned with no untoward incident occurring speaks volumes in respect of the unfounded fear that the book is likely to cause racial disharmony or riots. However, this fact was not given sufficient consideration by the learned High Court Judge. As for the alleged defamatory imputations arising from inaccurate depictions of historical or present-day personalities or events, affected parties or groups may resort to legal recourse such as instituting a defamation suit or publishing their own narratives to give their version.

[32] The learned High Court Judge also did not adequately consider the fact that in the affidavit, one of the crucial reasons given by the Minister to come to the conclusion that the book was likely to be prejudicial to public order was because of the 81 police reports lodged against it. In our opinion, it is unacceptable if the number of police reports or adverse responses in social media is considered an important yardstick by which a decision can be made to ban a publication. If that be the case, all it would take for any one disgruntled person or group to stifle the constitutionally guaranteed freedom of expression by a citizen is to orchestrate lodging of police reports or expressing anger on social media against the publication which is the target of their displeasure. In fact, in this case, the appellant deposed evidence in respect of the orchestration of the police reports by interested parties from political parties. This allegation was not sufficiently replied or rebutted by way of affidavit. This point was not addressed by the learned High Court Judge.

[33] The appellant also pointed out that the investigation report of the Ministry of Home Affairs which was the basis of the PO was not given to him but instead it was made a classified document under the Official Secrets Act 1972. In the premises, there could be other reasons for the ban which were not made known to the appellant. In the recent Court of Appeal case of *Islamic Renaissance Front Bhd v. The Minister Of Home Affairs* [2020] 5 MLJ 399, two relevant reports that the Minister relied on to ban the books in question were not supplied to the appellant despite a discovery order by the High Court in respect of the same. The Court of Appeal, speaking through Abu Bakar Jais JCA, in quashing the ban said as follows:

> The failure to show these begs the question whether it is true in the first place that the same were taken into account by the respondent before issuing the orders. It also begs the question whether the same is even material to be considered. Even more serious is the suspicion that these documents do not exist at all. The sum effect of this amounts to serious doubt whether there was a real exercise of discretion by the respondent as required by *Lie Seng Fatt* and *Wednesbury Corp*.

[34] We are mindful that there is no discovery order in this case for the investigation report to be supplied to the appellant. We are also mindful that other reasons were given in the lengthy affidavit of the Minister for the ban apart from the report. Nonetheless, as the Minister had stated that the report was taken into consideration for the ban, the failure to supply it calls into question the fairness of the exercise of the discretion under s. 7 of the PPPA. Furthermore, no national security ground was furnished by the Minister for not giving the report and for the classification of the report under the Official Secrets Act 1972. This fact was also not given sufficient consideration by the learned High Court Judge.

[35] In concluding this part of the judgment, we would say that the relevant test is, whether a similarly circumstanced Minister after evaluating the facts fairly and reasonably would have come to the same conclusion. For reasons given above, we would answer the question in the negative as there was no evidence whatsoever to suggest prejudice to public order or likelihood thereof that permitted the invocation of the drastic power given in s. 7(1) of the PPPA.

Right Of Hearing

[36] Counsel for appellant argued that the fact that no right of hearing was accorded to the appellant before the PO was issued is a ground for quashing the ban. It was not disputed also that after the PO was issued, the appellant sent two letters of appeal to the Minister but received no reply. The PPPA does not provide for a right to be heard as correctly noted by the learned High Court Judge. The recent Court of Appeal decisions in book banning cases on this issue appear to go either way.

[37] In *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* (*supra*), Abdul Wahab Patail JCA declined to consider this issue at length but opined that the right to be heard does not apply to administrative decisions. His Lordship said as follows:

> [22] The respondent had submitted upon procedural impropriety arising from not giving the respondent an opportunity to be heard before the order was made to prohibit the book because the respondent had a legitimate expectation it would not be prohibited in view of the fact the book had been in circulation for two years. It is a submission that strays from the issues raised in the appeal by the appellant. It was unnecessary. We need not address it further except to say that at the end of the passage in *Council of Civil Service Unions and Ors v. Minister for the Civil Service* [1985] 1 AC 374 quoted above, Lord Diplock drew a distinction between an exercise of administrative decision and an administrative tribunal.

[38] In *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal* (*supra*), Mohamad Ariff Yusof JCA was of the view that depending on the facts it might be difficult to interpose a duty to hear before prohibiting a publication. His Lordship said as follows:

> [56] The other grounds of failure to accord a right of hearing and failure to give a reasoned decision, however, are unconvincing on the facts and the law. In the context of s. 7 of PPPA, it might be difficult to interpose a duty to hear before the Government decides to prohibit a publication. There could conceivably be instances where speed may be of the essence and it will be impracticable to insist rigidly on a right of hearing.

[39] In *Islamic Renaissance Front Bhd v. The Minister Of Home Affairs* (*supra*) on the other hand, the Court of Appeal held that the failure to give a right of hearing was a ground to quash the decision of the Minister. However, the

decision can be reconciled with the view expressed in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal* (*supra*). The court in the *Islamic Renaissance* case did not say that the right to be heard before imposition of the ban is absolute as it can be excluded on national security grounds. But the Minister is duty bound to consider whether it should be given. Abu Bakar Jais JCA said as follows after considering the speech of Lord Fraser in the *CCSU* case (*supra*):

> [54] That passage above without doubt, requires the Minister in that case to consider whether prior consultation with those affected would be jeopardising national security itself and there must be reasons given. We considered that the word 'consultation' above means the right to be heard. So before a decision is made on the basis of national security, the Minister must think about giving the right to be heard. Only after considering this and with reasons, it is permissible for the Minister not to give that right since giving that right will affect national security. But in the first place, there must be such evidence. There must be evidence the Minister had considered giving the right of hearing.
>
> [55] Coming back to our case, there cannot be a doubt, there is no evidence the respondent as the Minister had considered to give the right of hearing to the appellant. It does not matter that right was not given to the appellant eventually. What is important is for the respondent to show the evidence that right was in fact considered to be given. The affidavits of the respondent do not indicate this evidence.

[40] We agree with the view expressed in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal* (*supra*) that there could be instances where speed may be of the essence and it would not do to give a right of hearing. Only on hindsight, it would appear otherwise. For that reason, although in the instant case, it appears that no harm would have been done in giving the appellant a right of hearing, we are not prepared to quash the decision on this ground alone.

Whether Section 7(1) Unconstitutional?

[41] Counsel for the appellant argued that the word "reasonable" must be read into art. 10(2) of the Federal Court which permits Parliament to impose restrictions on the freedom of speech and expression. The cases of *Sivarasa Rasiah* (*supra*) and *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* (*supra*) were cited in support. It was urged upon us that the grant of "absolute discretion" in s. 7 of the PPPA is unreasonable and therefore the provision should be struck down as unconstitutional. We find the argument to be without merit. As conceded by counsel for the appellant elsewhere in his written submission, the right to freedom of expression is not absolute and Parliament has placed restrictions on it through s. 7 of the PPPA. In respect of the "absolute discretion" granted to the Minister under s. 7, having regard to the authorities we cited earlier, it is clear that whatever label is attached

to the nature of the discretion, the Minister's action can be questioned it breaches administrative law principles. In the premises, we see no reason why the entire section should be struck down as being unconstitutional. Hence, we are of the view that prayer (4) for a declaration to strike down s. 7 of the PPPA should not be granted.

Conclusion

[42] For all the above reasons, we shall allow the appeal and set aside the decision of the High Court. We grant prayers (1), (2), (3), (5) and (6) of the judicial review application. Costs of RM1,000 to the appellant.